



## **Caitlin Halligan: An Injudicious Choice**

The Senate confirmed 15 of President Obama's judicial nominees last month as a result of Republicans' willingness to work with Democrats on consensus nominations. Senators must fulfill their duty to carefully evaluate all nominees, particularly when controversial or unsuitable. This is the case with the nomination of Caitlin Halligan to the United States Circuit Court of Appeals for the District of Columbia, which received a party-line vote in the Senate Judiciary Committee.<sup>1</sup>

Ms. Halligan's well-documented record as a committed advocate of extreme liberal positions raises questions about whether she would be a fair and impartial jurist. These concerns are compounded by the fact that Ms. Halligan has been nominated to one of the most important courts in the United States.

### **Targeting the Second Amendment**

As Solicitor General of New York, Ms. Halligan vigorously advanced a specious legal theory attempting to hold gun manufacturers liable for the crimes of third parties.<sup>2</sup> Gun Owners of America described this as a strategy to "eliminate the manufacture of firearms in America."<sup>3</sup> Despite the fact that New York law, as the appellate court explained, had "never recognized a common-law public nuisance cause of action" advanced by Ms. Halligan,<sup>4</sup> she mounted a crusade to hold the gun industry responsible for the "easy availability of illegal guns."<sup>5</sup> The New York state court rejected Ms. Halligan's call to judicial activism.<sup>6</sup>

In 2003, a bipartisan coalition in Congress responded to the type of frivolous litigation pushed by Ms. Halligan by introducing the Protection of Lawful Commerce in Arms Act (PLCAA). Ms. Halligan, in turn, sharply criticized this legislation,<sup>7</sup> which Congress ultimately enacted with wide support.<sup>8</sup> The National Rifle Association described PLCAA as "an essential protection both for the Second Amendment rights of honest Americans and for the continued existence of the domestic firearms industry."<sup>9</sup>

Undeterred, Ms. Halligan filed an *amicus* brief in federal court challenging the constitutionality of the PLCAA.<sup>10</sup> The Second Circuit, in rejecting Ms. Halligan's argument, held that PLCAA was constitutional and dismissed the litigation against gun manufacturers.<sup>11</sup>

### **Detention of Enemy Combatants**

In 2004, Ms. Halligan was a member of the Association of the Bar of the City of New York's Committee on Federal Courts when it issued a report asserting that the congressional Authorization for Use of Military Force (AUMF) did not authorize long-term detention of enemy combatants.<sup>12</sup> The report also argued against the use of military commissions to try alien terrorists and maintained that the preferred fora are Article III civilian courts. Subsequent holdings by the Supreme Court and positions of the Obama administration, however, rejected the fundamental assertions of the report.<sup>13</sup>

Ms. Halligan tried to distance herself from the report when she came before the Senate Judiciary Committee. However, at the time the report was being considered by the Committee on Federal Courts she did not abstain from it, as four other committee members did.<sup>14</sup> Furthermore, Ms. Halligan did not repudiate the report or its left-wing extremism before her nomination or before her hearing.

Ms. Halligan also co-authored an *amicus* brief in the 2009 case *Al-Marri v. Spagone* arguing that the AUMF did not authorize the seizure and long-term military detention, without criminal trial, of a lawful permanent resident alien.<sup>15</sup> Ms. Halligan's position was contrary to the clear Supreme Court holding in *Hamdi* that the detention of enemy combatants without the prospect of criminal charges or trial until the end of hostilities is proper under the AUMF and the Constitution.<sup>16</sup>

### **Judicial Activism**

Ms. Halligan has spoken approvingly of using courts to promote liberal ambitions – a fact that suggests she would be an unconstrained activist if confirmed. In a speech in 2003, Ms. Halligan stated that “courts are the special friend of liberty. Time and time again we have seen how the dynamics of our rule of law enables enviable social progress and mobility.”<sup>17</sup> This view of the law is inconsistent with the important but limited role of a judge: applying the law to the facts, not ensuring that his or her own aspirations for society are met. In *Scheidler v. National Organization for Women*, Ms. Halligan filed an *amicus* brief arguing for an expansive definition of extortion under the Hobbs Act, which would have allowed for a cause of action against pro-life protestors. The Supreme Court rejected her position 8-1.<sup>18</sup>

Presidents may choose whomever they please for most political appointments. However, the special role of federal judges as unbiased umpires protecting the rule of law requires that nominees for the bench meet a different standard. Ms. Halligan fails to meet that standard.

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<sup>1</sup> Senate Judiciary Committee Executive Meeting on March 10, 2011.

<sup>2</sup> *People of the State of New York v. Sturm & Ruger Co.*, 309 A.D.2d 91 (2003)

<sup>3</sup> Gun Owners of America, letter dated March 9, 2011. See, <http://legaltimes.typepad.com/files/goa-opposition-letter.pdf>

<sup>4</sup> *Sturm*, 309 A.D.2d at 94.

<sup>5</sup> Law Day Speech by Caitlin Halligan, delivered May 5, 2003, in White Plains, New York.

<sup>6</sup> *Sturm*, 309 A.D.2d at 93-94.

<sup>7</sup> See Footnote 4, *supra*.

<sup>8</sup> PLCAA passed the Senate with nearly half of the Democrat Caucus voting in favor of the legislation. See,

[http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm?congress=109&session=1&vote=00219](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=109&session=1&vote=00219)

<sup>9</sup> National Rifle Association, letter dated March 9, 2011. See, <http://legaltimes.typepad.com/files/nra-opposition-letter.pdf>

<sup>10</sup> *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008)(Andrew Cuomo, Attorney General of the State of New York, Caitlin J. Halligan, Solicitor General.), Albany, NY, for Amicus Curiae New York State Attorney General.

<sup>11</sup> See generally, *Id.*

<sup>12</sup> “The indefinite detention of “enemy combatants: Balancing due process and national security in the context of the war on terror,” The Association of the Bar of the City of New York, Committee on Federal Courts, February 6, 2004, [http://www.abcnyc.org/pdf/1C\\_WL06!.pdf](http://www.abcnyc.org/pdf/1C_WL06!.pdf)

<sup>13</sup> See, e.g. *Hamdi v. Rumsfeld*, 542 U.S. 507(2004); U.S. Prepares to Life Ban on Guantanamo Cases, NY Times, January 19, 2011.

<sup>14</sup> Correspondence from Caitlin Halligan to the Senate Judiciary Committee, February 22, 2011. Notes of the Committee: <http://www.judiciary.senate.gov/nominations/112thCongressJudicialNominations/upload/CaitlinHalligan-QFRs.pdf>

<sup>15</sup> See, Brief for Constitutional, Criminal Procedure and other Legal Scholars as *Amici Curiae* in case number 08-368, *Al-Marri v. Spagone*. Available at: <http://goo.gl/fodjs>

<sup>16</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507(2004).

<sup>17</sup> See Footnote 4, *supra*.

<sup>18</sup> *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003).